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Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RILEY JENT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I.

Whether the Florida Supreme Court has declined to conduct the independent determination of the imposition of death sentence this Court in Proffitt v. Florida, 428 U.S. 242 (1976) said that the state court must do, thus rendering Florida's death penalty statute, Section 921.141, Florida Statutes unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution?

II.

Whether the trial court denied Jent due process of law when it ruled that witness Samantha Carver continued to have a Fifth Amendment privilege against self-incrimination for a murder charge which the state did not intend to charge her with committing?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is reported as Jent v. State, 408 So.2d 1024 (Fla.1981). It is reproduced in the appendix as item 1. (A1-10)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on December 3, 1981. (A1-10) Petitioner filed a motion for rehearing which was denied on February 15, 1982. (A11) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Supreme Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offen[c]e to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Section 921.141, Florida Statutes (1980) which is set forth in the Appendix as A11-13.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Pasco County on August 29, 1979, charged William Jent and his step-brother, Ernest Miller, with the premeditated murder of a girl identified as "Tammy." (R32-33) Subsequent to their plea of not guilty, they filed several pretrial motions. Of particular importance to this appeal, Jent filed a motion for continuance, (R766-769), because he wanted to depose Samantha Carver who had pled guilty to accessory-after-the-fact to the murder shortly before his trial. Carver, however, still maintained her Fifth Amendment privilege against self-incrimination, and the court denied the motion. (R770)

The court granted a State Motion to Sever (R139;2667) and Jent proceeded to trial on December 17, 1979. (Miller was tried and convicted on November 15, 1979.) He was convicted as charged. (R891)

Subsequently the court sentenced him to death. (R897) The court found as aggravating circumstances that: (1) the murder was especially heinous, atrocious and cruel (R892), and (2) it was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R892) The court found in mitigation only that Appellant had no significant history of prior criminal activity. (R893) Section 921.141, Florida Statutes (1980).

Appellant also filed a motion for a new trial (R864-865) and an amended motion for a new trial (R871-876) alleging that someone else had committed the murder. After considering the evidence presented at this hearing, the court denied the motion. (R888-889)

The Florida Supreme Court affirmed the lower court's judgment and sentence. Jent v. State, 408 So.2d 1024 (Fla.1981) (A1-9) The court also denied a subsequent motion for rehearing. (R14)

STATEMENT OF THE FACTS*

The murder giving rise to the charge against Jent ostensibly occurred on the evening of 12-13, July, 1979. The evening began when a group of people consisting of Ernie Miller (co-defendant), Glenna Frye, John Mortolla, Patricia Tirikaine, and Carlena Jo "C.J." Hubbard, left the Caboose Bar in Dade City. (R1976) They made a brief stop at Jackie's Pub (R1577), another bar, and then went to a party at a trestle on the south side of the Lacoochee River in Pasco County. (R1637) Jent, Samantha Carver and a man known only as Ricky were already there. (R1619) By the time Hubbard and Tirikaine arrived, they were well on their way to being drunk or, as Hubbard said, "Higher than high." (R1601,1623) The area apparently did not have any sticks to use for firewood, so they lit the area with candles. (R1681)

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* The three eyewitnesses to this murder have severe credibility problems. Each has given several inconsistent stories of what did or did not happen on the night of the murder. C.J. Hubbard was drunk, or, as she said, "Higher than high." (R1580) Patricia Tirikaine was also drunk (R1621), has memory problems (R1630), and has needed psychiatric care in the past. (R1635) Glenna Frye was a drug addict. (R1685-1687)

Sometime during this party, Hubbard went up the river a short way. (R1581) She heard some screaming and returned and saw Jent and Miller hitting a girl. (R1583) How the girl, who Hubbard first called Elizabeth (R1607) but later said was called Tammy, arrived at the river is unknown because she did not come with Miller and his group (R1629), and apparently was not at the river when they arrived. (R1613) Moreover, no one seems to have known her or where she came from. (R1614) In any event, according to Frye this beating started because Carver and Tammy were fighting. (R1640-1641) Jent pulled Carver off of Tammy and then began to beat Tammy. (R1642-1643) Miller, who was standing next to Frye, then joined the beating. (R1643) They hit the girl so often and hard that "her face was horrible." (R1705) Miller told Frye to hand him a stick which she did. (R1643) He then beat her some more with the stick. (R1644) The girl by this time was unconscious and Jent said she was dead. (R1617) Miller then told everyone to get in the car (R1587), and he and Jent carried the girl and placed her in the trunk of Miller's car. (R1645)

They returned to Miller's house. (R1648) The girl was taken out of the trunk, laid on the back of the trunk and raped by four men, including Jent and Miller. (R1667-1670) Frye, Tirikaine and Hubbard watched. (R1668)**

The girl was placed back in the trunk and Miller told everyone they were leaving. (R1666) Again everyone, except Ricky, who had passed out in Miller's house (R1671), climbed into the car and then the group headed for the Richloam Game Preserve. (R1671) Once there Miller told everyone to get out. (R1672) Jent and Miller lifted the girl out of the trunk and laid her on the ground in front of the car. (R1673) The girl

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** Frye, however, is the only one who claimed to have seen the rape.

woke up, but Jent knocked her down. (R1673-1674) Miller poured some gas on her and then set the gas on fire. (R1595)

The body was discovered on the afternoon of July 13 by a rancher looking for some stray cattle. (R1507)

Another explanation of how the body got to the Richloam Game Preserve exists, however.

Gail Bradshaw and her boyfriend, Bobby Dodd, lived in a trailer in Dade City. (R2345) Her sister, Glenda Branch, also lived in the vicinity. (R2344) The relationship between Bobby and Gail, however, was strained. Gail, a number of times, had threatened to turn Bobby over to the law. (R2377) Bobby, a karate expert (R2376), had in turn threatened to kill Gail. (R2377)

Events culminated sometime during the week prior to July 13. On July 10, Gail called her sister and asked if she could move in with her. (R2347) On that Friday, Bobby, Gail and the next door neighbor, Elmer Carroll, left in Bobby's car and eventually the trio stopped at the Richloam Game Preserve. (R2365) At the game preserve Bobby wanted to have sex with Gail, but she demurred because Carroll was present. (R2370) Dodd then took out a knife and cut off some of Gail's hair. He began taunting her about her threats to turn him in and finally, he grabbed her by the neck and hit her head on the ground two times. (R2372) She lost consciousness. (R2373) Bobby then poured some gas on her and lit it while Carroll looked on. (R2374)

Carroll and Dodd returned to their trailers the next morning. (R2374) When Tina Marvin, Carroll's pregnant girlfriend, asked where Gail was, they said she had been left in Tampa. (R2375) Dodd, to insure Carroll's silence, said he would do the same thing to Tina if anything ever got out about the murder. (R2376)

By this time Carroll was very nervous and drinking and using drugs more than usual. (R2435) When he learned that

the body had been discovered, he told Tina to sell everything because they were leaving. (R2438) They headed north, but their car broke down in Georgia. (R2439) Carroll then told Tina what had happened to Gail. (R2440)

REASONS FOR GRANTING THE WRIT

I.

THE FLORIDA SUPREME COURT HAS DECLINED TO CONDUCT THE INDEPENDENT DETERMINATION OF THE IMPOSITION OF DEATH SENTENCE THIS COURT IN PROFFITT v. FLORIDA, 428 U.S. 242 (1976) SAID THAT THE STATE COURT MUST DO, THUS RENDERING FLORIDA'S DEATH PENALTY STATUTE, SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976) this Court approved Florida's Death Penalty Statute, Section 921.141, Florida Statutes (1976). A key factor in upholding its constitutionality was the role the state supreme court played in insuring that the death sentence was not imposed in an arbitrary or capricious manner.

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481,484 (1975). See also Sullivan v. State, 303 So.2d 632,637 (1974)

Id., at 252-253.

Early Florida Supreme Court cases emphasized this independent evaluation and reweighing function by referring to Florida's trifurcated sentencing process. Alvord v. State, 322 So.2d 533 (Fla.1975); Tedder v. State, 322 So.2d 908 (Fla.1975).

The jury, the judge and the Florida Supreme Court have significant functions in determining the appropriatness of a death sentence. Such intimate involvement with the facts of a case, the credibility of witnesses and the correctness of a sentence is a radical departure from the normal appellate function of reviewing only legal errors. Nevertheless, the Florida Supreme Court accepted this unique burden in order for the State to have a constitutional death penalty statute.

It now appears, however, that that burden has proven too heavy, and the State Supreme Court has unloaded itself of some of the tasks it said it would perform in capital cases. Specifically, the court has refused to reweigh evidence and conduct the independent evaluation of the evidence this court in Proffitt said the Florida Supreme Court would do. Brown v. Wainwright, 392 So.2d 1327,1331 (Fla.1981) In Brown, all the Florida death row inmates challenged the Florida Supreme Court's practise of considering, in the course of reviewing sentences of death, documents which were not made available to the Defendant's counsel.

In rejecting that challenge, the Florida Supreme Court said:

> [4] This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law.
>
> * * *
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973), cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

> [5,6] Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluaton.
>
> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Id. at 1331-1332, footnotes and certain cites omitted.

Jent is a victim of this retreachment. On appeal he asked the court, in accordance with one of its cases, Tibbs v. State, 337 So.2d 788 (Fla.1976), to reweigh the evidence used to convict him. There certainly was reason to do so. The primary evidence used to convict and sentence Jent was the testimony of three women and a single three-quarter inch strand of hair found at the murder site. But the girls who had claimed to have seen the murder had each given several different versions of what had or had not occurred. And they either had mental problems or were so drunk that they were unaware what, if anything, happened. Similarly, the hair strand was found four days after the murder and three days after the body had been discovered and removed.

The Florida Supreme Court, however, had receded from Tibbs, and in Tibbs v. State, 397 So.2d 1120 (Fla.1981) it said that is proper function was to review, not reweigh the evidence.

In this case the Florida Supreme Court has extended Tibbs II to the sentencing process for capital cases. (Slip opinion at page 4, footnote 8.) Because the Florida Supreme Court no longer reweighs the evidence or otherwise independently evaluates the evidence in any phase of a capital case, there is naturally no merit to a claim that the court erred in not finding the "weakness" of the evidence as a mitigating factor. (Id., footnote 8.)

Thus, Jent is asking this Court to examine whether Florida has abandoned a crucial part of Florida's Death Penalty scheme.

The importance of this issue is obvious. Capital punishment, by virtue of its finality, is qualitatively different from any other form of punishment available to the State. And this Court has carefully monitored Florida's efforts to enact a constitutional death penalty statute and procedures to implement that statute. See, e.g., Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977). If Florida refuses to do what this Court in Proffitt said it would do, then this Court should re-examine Florida's sentencing procedures and if necessary, remind the State of the promises it made in Proffitt.

Further, this case presents this Court with vehicle by which it can conduct this re-examination. The heinousness of the murder was the only factor aggravating this murder. Miller v. State, __So.2d__ (Case No.58,795, opinion filed March 25, 1982)(McDonald concurring) And it evidently outweighed the mitigating factor of Jent's lack of prior criminal record. (R892-893) Yet, the evidence supporting the aggravating factor is extremely questionable; but this fact was rejected by the State Supreme Court as a mitigating factor to be considered.

Consequently, by refusing to reweigh this evidence, has Florida introduced constitutionally unacceptable level of

arbitrariness and caprice into its capital sentencing structure? That is the question this case presents to this Court.

II.

THE TRIAL COURT DENIED JENT DUE PROCESS OF LAW WHEN IT RULED THAT WITNESS SAMANTHA CARVER CONTINUED TO HAVE A FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION FOR A MURDER CHARGE WHICH THE STATE DID NOT INTEND TO CHARGE HER WITH COMMITTING.

On December 13 or 14, 1979, Samantha Carver, an alleged witness to the murder of Tammy, pled guilty to accessory-after-the-fact. (R1976) In return for her plea, "the State would not proceed on any higher crime against Miss Carver based upon the facts surrounding this incident." (R1983,1984)

Immediately after her change of plea, Jent's attorney sought to depose her,[1] but Carver, upon advice of her counsel, invoked her Fifth Amendment privilege to remain silent. (R1977) Defense counsel then approached the court with a motion to continue so he could depose Carver. In order to rule upon that motion, however, the court first considered whether Carver still had a Fifth Amendment privilege to assert.

The State, supporting the contention that she had that right said,

> ...I would think that if she would come forward, testify she did have knowledge or did not have knowledge and testified inconsistently with her prior statement,[2] then that would be a perjured statement at least of what she has said previously....

(R1981)

* * *

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[1] Authorized by Rule 3.220, Florida Rules of Criminal Procedure.

[2] See Record 1991-1992.

> Your Honor,...accessory after the fact would not be a lesser included offense of the crime of murder and, therefore, we would not be precluded from going forward should the facts become available, and I have no idea how they would become available, but should they become available, this case [Newkirk v. State, 222 So.2d 435 (Fla.3d DCA 1969)] indicates we are not precluded from charging her with murder in the first degree should those facts become available.

(R1988)

The court, relying upon this speculation, held that Carver still had a Fifth Amendment privilege to assert and denied the motion to continue. (R1992) But the fundamental issue the trial court missed and the Florida Supreme Court ignored was whether the State could suppress Carver's testimony by raising the possibility that it may at some time in the future have sufficient evidence to charge her with murder. Thus, the effect of this ruling was to forever foreclose Jent from discovering what Carver had to say.

In the balance here are two competing interests. First, society has a significant legitimate interest in punishing those guilty of a crime. On the other hand, a criminal defendant as well as society "...has a right to everyman's evidence" unless some privilege conditions that duty. United States v. Mandujano, 425 U.S. 564, 48 L.Ed.2d 212, 96 S.Ct. 1768 (1976) In this case, as long as the State could hold the possibility of a murder charge over Carver's head,[3/] she had a legitimate Fifth Amendment privilege to exert. The question is whether, under principles of due process it was fair for the State to forever hold open this option in order to suppress her testimony when it never expected to charge Carver with murder? (R1988)

In Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) this Cort held that it was a violation of due

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3/ In Florida there is no applicable statute of limitations for murder. Section 775.15(1), Florida Statutes (1980).

Process for the State to suppress material evidence requested by the defendant. Id at 87.

Here the materiality of Carver's testimony is, of course, unknown because she asserted her Fifth Amendment right against self-incrimination. Nevertheless, the thrust of Brady is that justice is served when trials are fair. Withholding evidence from the defense whether through the nondisclosure of Brady evidence or by threats of prosecution as was done in this case does not serve to ensure fair trials.

This case, moreover, does not present the situation of whether the State could or could not have charged Carver with murder. By the time Jent sought to depose Carver, the State had thoroughly investigated its case and had, in fact, convicted Miller, Jent's co-defendant, of murder. Clearly, the State knew the facts and Carver's involvement in it. Thus refined, the question presented here is whether, given the State's extensive knowledge of the case against Carver, and its declared intention not to prosecute her for any higher crimes, was it fair to suppress her testimony by threats of a speculative prosecution sometime in the future.[4/]

4/ The three eyewitnesses to the murder who testified at trial were charged with accessory after the fact but were told they would not go to jail if they told the truth. (R1678) They were never charged with or prosecuted for the murder.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

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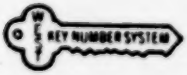
141(6)(a), Florida Statutes (1977),[5] because the findings that directly follow the initial finding also concern lack of mitigating circumstances. The trial judge properly differentiated mitigating from aggravating circumstances in negating the statutorily described mitigating circumstance.

[5] Finally, appellant claims that the trial judge limited jury consideration of nonstatutory mitigating circumstances by giving the standard jury instruction which states: "The mitigating circumstances which you may consider, if established by the evidence, are these . . . ." We have previously considered this argument in depth and have flatly rejected it. *See Peek v. State*, 395 So.2d 492, 496-97 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). *See also Demps v. State*, 353 So.2d 501, 505 (Fla.1981).

Having found no merit in any of appellant's arguments, and having conducted a full review of the sentence which found several aggravating and no mitigating circumstances, we are unable to discern any error that may have deprived appellant of any protections offered by the judicial process. Accordingly the sentence of death is affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.



5. "The defendant has no significant history of prior criminal activity."

William Riley JENT, Appellant,

v.

STATE of Florida, Appellee.

No. 58744.

Supreme Court of Florida.

Dec. 3, 1981.

Rehearing Denied Feb. 15, 1982.

Defendant was convicted before the Circuit Court, Pasco County, Wayne L. Cobb, J., of first-degree murder and sentenced to death, and he appealed. The Supreme Court held that: (1) defendant, who otherwise adequately cross-examined eyewitnesses, failed to present sufficient predicate for access to the witnesses' grand jury testimony; (2) although State conceded that its witnesses were not pillars of the community, reviewing court was not required to reweigh the evidence; (3) there was no abuse of discretion in allowing hair analysis testimony; (4) defendant failed to show prejudice of constitutional dimension due to presence of cameras in courtroom during trial; (5) in view of recantation of statements in affidavits, it was not abuse of discretion to deny new trial on ground of new evidence; and (6) the aggravating circumstances, for imposition of death penalty, that homicide was committed in a cold, calculating and premeditated manner without pretense of moral or legal justification is not an unconstitutional attempt to govern practice and procedure and does not improperly place a burden of proof on defendant.

Affirmed.

1. Criminal Law ⇐627.9(1, 5)

There is no pretrial right to inspect grand jury testimony as an aid in preparing one's defense, and holding an in camera inspection of such testimony is within the trial court's discretion. West's F.S.A. §§ 905.27, 905.27(1).

A1

2. Criminal Law ⇐627.9(1)

To obtain access to grand jury testimony a proper predicate must be laid. West's F.S.A. §§ 905.27, 905.27(1).

3. Criminal Law ⇐627.9(4)

Mere surmise or speculation regarding possible inconsistencies in testimony is not a proper predicate for securing access to grand jury testimony. West's F.S.A. §§ 905.27, 905.27(1).

4. Criminal Law ⇐627.9(4)

Where, through cross-examination, defense counsel drew attention to inconsistencies between eyewitnesses' trial testimony and prior depositions, the defense failed to present a sufficient predicate for access to grand jury testimony, which was sought for impeachment purposes, and trial judge did not abuse his discretion in denying the request. West's F.S.A. §§ 905.27, 905.27(1).

5. Indictment and Information ⇐189(8)

Accessory after the fact is not a lesser included offense of premeditated murder.

6. Criminal Law ⇐586

A continuance may be granted in a trial court's discretion, but only for good cause shown. West's F.S.A. Rules Crim. Proc., Rule 3.190(g)(2).

7. Criminal Law ⇐1151

Trial court's ruling on request for a continuance will not be disturbed unless a palpable abuse of discretion is demonstrated. West's F.S.A. Rules Crim.Proc., Rule 3.190(g)(2).

8. Criminal Law ⇐594(1), 627.2

There was no abuse of discretion in denial of motion for continuance and order requiring an eyewitness, who pled nolo contendere of accessory after the fact to homicide, to submit to deposition where trial court found that witness still had a Fifth Amendment privilege and that the defense had no reason or ground to believe that her testimony would exculpate defendant. West's F.S.A. Rules Crim.Proc., Rule 3.190(g)(2); U.S.C.A.Const.Amend. 5.

9. Criminal Law ⇐641.13(6)

Counsel diligently sought motion for continuance and order requiring eyewitness to submit to deposition and counsel's suffering adverse ruling did not rise to level of ineffective assistance.

10. Criminal Law ⇐1159.4(2)

Although the State conceded that its witnesses were not pillars of the community, the reviewing court would not reweigh the evidence to determine its sufficiency to support conviction as determining credibility of witness is within the province of the jury and it is within jury's duty to resolve conflicts and absent a clear showing of error its findings will not be disturbed.

11. Criminal Law ⇐388

As a general rule, the problem presented to a trial court is whether scientific tests are so unreliable and scientifically unacceptable that admission of those test results constitutes error.

12. Criminal Law ⇐1153(1)

A trial court has wide discretion concerning the admissibility of evidence and, absent abuse of discretion, a ruling regarding admissibility will not be disturbed on appeal.

13. Criminal Law ⇐472

There was no abuse of discretion in allowing hair analysis testimony and substance of that testimony was not out of order where technician repeatedly stated that she could not positively identify the unknown hair, which was found at scene, as being defendant's.

14. Criminal Law ⇐633(1)

To have cameras excluded from a courtroom during trial a defendant must show prejudice of constitutional dimensions.

15. Criminal Law ⇐1166.11

Defendant, claiming that trial court erred in denying motion to exclude cameras from the courtroom, failed to show prejudice of constitutional dimension and denial of motion to exclude was not abuse of discretion where only allegation was that clicking of the camera distracted counsel

A2

thereby denying defendant the effective assistance of counsel and trial judge, while expressing his dislike for presence of cameras, stated that he could not hear any such clicking and that he would grant the motion if, at any time, he found the camera distracting.

16. Indictment and Information ⇐71.2(1)

An indictment must fulfill two requirements: the defendant must be apprised of the charges sufficiently to enable preparation of a defense and the allegations must be specific enough to protect defendant against being placed in jeopardy twice for the same offense.

17. Indictment and Information ⇐101

If deceased's name is unknown, a homicide indictment must give as clear a description of the person as the facts before the grand jury permit.

18. Indictment and Information ⇐101

Indictment charging defendant with one count of premeditated murder for death of, "Tammy, a white female, (of specified height and weight), a better description of said person to the Grand Jury unknown," sufficiently apprised defendant of the crime charged and called on him to answer for the death of one particular person and no other.

19. Homicide ⇐229

The State proved beyond a reasonable doubt that the person allegedly beaten, raped and burned and the person autopsied were one and the same in view of medical examiner's testimony that she visited scene and observed as police took photograph of victim's body and identified one of those photographs and stated that she performed an autopsy on the person in that photograph, with an eyewitness identifying one of the photographs taken at the scene as being of the victim.

20. Criminal Law ⇐958(6)

Denial of new trial on ground of new and material evidence was not abuse of discretion where, when testifying at hearing, affiants recanted their recitals in affidavit that body identified in indictment and at trial as "Tammy" was, in fact, that of another and that someone other than defendant caused her death and testified that statements on which their affidavits were based were prompted by codefendant's promises that female affiant and her child would be taken care of while male affiant was in jail. West's F.S.A. Rules Crim.Proc., Rule 3.600(a)(3).

21. Homicide ⇐341

Failure to instruct on underlying felony was harmless error in prosecution for first-degree murder where the State "feebly" argued felony-murder but evidence overwhelmingly showed a premeditated murder and defense did not request such instruction and defendant failed to show any prejudice from failure to so instruct.

22. Homicide ⇐351

There is no unconstitutional attempt to govern practice and procedure by virtue of aggravating circumstance, for imposition of death penalty, that capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. West's F.S.A. §§ 921.141, 921.141(5)(i).

23. Homicide ⇐354

Level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in the aggravating circumstance, for imposition of death penalty, that homicide was committed in cold, calculating and premeditated manner. West's F.S.A. §§ 921.141, 921.141(5)(i).

24. Homicide ⇐354

The aggravating circumstance, for imposition of death penalty, that homicide was committed in a cold, calculating and premeditated manner without any pretense of moral or legal justification does not improperly place the burden of proof on a defendant as the state must prove beyond a reasonable doubt the elements of the premeditation aggravating factor. West's F.S.A. §§ 921.141, 921.141(5)(i).

25. Criminal Law ⇐796

Trial court did not improperly limit consideration of mitigating evidence in im-

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posing death penalty where defendant, complaining that the court did not instruct on nonstatutory mitigating evidence, did not request such instruction and, when asked by the court, defense counsel indicated his satisfaction with the court's proposed instructions. West's F.S.A. § 921.141.

Leonard J. Holton, Dade City, and Jerry Hill, Public Defender, and David A. Davis, Asst. Public Defender, Bartow, for appellant.

Jim Smith, Atty. Gen., and Michael J. Kotler, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

William Jent appeals his conviction of first-degree murder and sentence of death. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm both his conviction and sentence.

On July 13, 1979 four men rode on horseback through the Richloam Game Preserve in Pasco County looking for some stray cattle. Instead of the cattle, they found the badly burned body of a young woman. Six weeks later an indictment issued, charging Jent and his stepbrother Ernest Miller[1] with the premeditated murder of a woman named "Tammy."[2]

At trial three eyewitnesses presented an ugly, confused story—a drunken swimming party, the beating of the unknown woman by Jent and his stepbrother, transporting her in the trunk of a car to Miller's home where four men raped her, and placing the woman back in the car trunk and taking her to the game preserve where Jent and Miller poured gasoline on the woman and set her on fire. The medical examiner testified that the victim had been alive when ignited and that burns were the cause of death. The jury convicted Jent as charged, and the trial court sentenced him to death. This appeal followed.

Jent alleges that the trial court erred by failing to provide him with transcripts of the grand jury testimony of three eyewitnesses. Just prior to trial Jent's attorney requested access to this testimony, claiming that the three witnesses' testimony at trial would be inconsistent with what they had told the grand jury.[3] Counsel claimed that the prior testimony would provide impeachment material, to which Jent was entitled under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). After hearing argument, the court found that the defense had not laid a proper predicate for disclosure of grand jury testimony under the exceptions to section 905.27, Florida Statutes (1979).[4]

[1-3] There is no pretrial right to inspect grand jury testimony as an aid in preparing one's defense and holding an in camera inspection of such testimony is a matter within the trial court's discretion. *Minton v. State*, 113 So.2d 361 (Fla.1959). To obtain access to grand jury testimony, a proper predicate must be laid. Mere surmise or speculation regarding possible inconsistencies in testimony is not a proper predicate. *Id.*

[4] The three eyewitnesses testified at Jent's trial. Through cross-examination, defense counsel drew attention to inconsistencies between each one's trial testimony

1. The jury convicted Miller of first-degree murder in a separate trial. In a combined sentencing hearing both Jent and Miller received the death penalty. *Miller v. State*, No. 58,795 (Fla.).

2. Several witnesses referred to the victim as "Tammy." Her name has never been established more definitely.

3. Defense counsel stated that he was not alleging that they would commit perjury.

4. § 905.27(1), which allows disclosure of grand jury testimony for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

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and her previously given depositions.[5] If, as defense counsel stated, he sought the grand jury testimony in order to attack these witnesses' credibility, the cross-examination obviated that need for their prior testimony. We agree that the defense failed to present a sufficient predicate and find that the trial judge did not abuse his discretion in denying the request for access to grand jury testimony.

[5] A few days prior to Jent's trial Samantha Carver, an eyewitness, pled nolo contendere to a charge, arising from the instant homicide, of accessory after the fact. Jent sought to depose Carver, but, on advice of counsel, she invoked her fifth amendment right to remain silent. Jent then moved for a continuance and an order requiring Carver to submit to a deposition.[6] After hearing argument, the trial court denied the motion, finding that Carver still had a fifth amendment privilege, that if her testimony were personally inculpatory she could face other criminal charges,[7] and that the defense had no reasonable grounds to believe that her testimony would exculpate Jent. Jent now claims that the court erred in denying his motion for a continuance, thereby denying him effective assistance of counsel.

[6-9] We find no merit to this claim. A continuance may be granted in a trial court's discretion, but only for good cause shown by the party seeking the continuance. Fla.R.Crim.P. 3.190(g)(2). The trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. *Magill v. State*, 386 So.2d 1188 (Fla.1980), *cert. denied*, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981). No such showing has been made in the instant case. Additionally, Jent's counsel diligently pursued the matter, and his suffering an adverse ruling does not rise to the level of ineffective assistance of counsel.

Jent also challenges the sufficiency of the evidence to convict him of murder. He alleges that the quality of the evidence is so poor that it fails to establish his guilt beyond a reasonable doubt and asks this Court to reweigh the evidence as it did in *Tibbs v. State*, 337 So.2d 788 (Fla.1976). In making this claim Jent did not have the benefit of our second *Tibbs* opinion in which we receded from the case on which he relies. *Tibbs v. State*, 397 So.2d 1120 (Fla.1981). In the latter *Tibbs* we reaffirmed this Court's previous conclusion in *State v. Smith*, 249 So.2d 16 (Fla.1971), that, when a jury properly performs its duty, a reviewing court should not reweigh the evidence.

[10] The state concedes that its witnesses were not pillars of the community. Determining the credibility of witnesses, however, is within the province of the jury. It is the jury's duty to resolve factual conflicts, and, absent a clear showing of error, its findings will not be disturbed. *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1229 (1976); *Spinkellink v. State*, 313 So.2d 666 (Fla.1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Our review of the record convinces us that the jury performed its function properly and that its verdict is supported by competent, substantial evidence.[8]

When the body was found, the victim's head was resting against a small stump, which a detective uprooted and had examined. Laboratory technicians found several hairs on the stump, some of which came from the victim and one of unknown origin. The technician who performed a microanalysis of the hairs testified at trial. During the proffer of her testimony, as well as

5. Each of the three witnesses had given two depositions. Any inconsistencies do not rise to the favorable evidence level of *Brady*.

6. Carver had not been adjudicated and sentenced when the court heard this motion nor had she been granted immunity.

7. The trial court correctly concluded that accessory after the fact is not a lesser included offense of premeditated murder. *See Palmes v. State*, 397 So.2d 648 (Fla.1981).

8. We find no merit in Jent's contention that the trial court erred in not finding "weakness" of the evidence as a mitigating factor in the sentencing proceeding.

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during direct and cross-examination, she testified that the unknown hair was microscopically the same as Jent's and that it was "highly likely" that the unknown hair and the samples of Jent's hair that she had examined had come from the same source. In response to questions from both sides regarding positive identification, however, she repeatedly stated that the unknown hair could not positively be identified as having come from Jent.[9]

Defense counsel objected to testimony regarding hair analysis on the ground that such analysis is not sufficiently reliable or exact to be allowed into evidence. The state countered the objection by claiming that hair analysis is a recognized scientific procedure and that the defense's argument went to the weight to be given the testimony, not to its admissibility. The trial judge stated that the reliability of microanalysis was a determination for the court to make. After the proffer of the technician's testimony and argument by both sides, the court overruled the defense's objection and allowed the testimony into evidence.

[11-13] As a general rule, the problem presented to a trial court is whether scientific tests are so unreliable and scientifically unacceptable that admission of those test results constitutes error. *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970). This Court has recognized that testimony regarding hair analysis can be admitted into evidence in a criminal trial. *Peek v. State*, 395 So.2d 492 (Fla.1980). A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. *See Mikenas v. State*, 367 So.2d 606 (Fla.1978); *Rodriguez v. State*, 327 So.2d 908 (Fla. 3d DCA 1976); *Coppolino v. State*. We find no abuse of discretion in regards to allowing hair analysis testimony in the instant case, nor do we find the substance of that testimony out of order. The technician repeatedly stated that she could not positively identify the unknown hair as being Jent's. Determining what weight to accord this testimony was within the jury's province, and no error occurred in permitting the jury to hear this testimony.

[14] Jent claims that the trial court erred in denying his motion to exclude cameras from the courtroom during his trial. Neither the United States Supreme Court nor this Court has found the presence of cameras in a courtroom to constitute a per se denial of due process. *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981); *In Re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla.), *appeal dismissed*, 444 U.S. 976, 100 S.Ct. 476, 62 L.Ed.2d 403 (1979). In order to have cameras excluded from a courtroom during trial, a defendant must show prejudice of constitutional dimensions. *Compare Clark v. State*, 379 So.2d 97 (Fla.1979), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981), *with State v. Green*, 395 So.2d 532 (Fla.1981).

[15] Jent's only allegation regarding this claim is that the clicking of the camera distracted his attorney, thereby denying him the effective assistance of counsel. The trial judge, while expressing his dislike for the presence of cameras, stated that he could not hear any such clicking. He also stated that he would grant the motion if, at any time, he found the camera distracting. The motion was never granted, so, obviously, the court never found the camera so distracting as to necessitate its removal. We find that Jent has not shown prejudice of constitutional dimensions and that the trial judge did not abuse his discretion in refusing to grant the motion.

Jent alleges error on two points regarding the victim's identity. He first claims

9. "[E]xcept in rare instances, there are not enough individual characteristics in hair from which to determine positively that a hair of unknown source came from a particular person to the exclusion of all other persons." A. Moenssens & F. Inbau, Scientific Evidence in Criminal Cases 412 (1978) (footnote omitted). This Court acknowledged that conclusion in *Peek v. State*, 395 So.2d 492 (Fla.1980).

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that the indictment did not sufficiently describe one certain person [10] and that the trial court erred in failing to grant his motion to dismiss the indictment. Jent's second point is that the state failed to prove beyond a reasonable doubt that the person allegedly beaten, raped, and burned and the person autopsied were one and the same.

[16–18] We agree with the state that no error occurred regarding the victim's identity. An indictment must fulfill two requirements: the defendant must be apprised of the charges sufficiently to enable preparation of a defense, and the allegations must be specific enough to protect the defendant against being placed in jeopardy twice for the same offense. *State v. Black*, 385 So.2d 1372 (Fla.1980). If the deceased's name is unknown, the indictment must give as clear a description of the person as the facts before the grand jury permit. *Johnson v. State*, 60 Tex.Crim. 305, 131 S.W. 1085 (1910). *See Commonwealth v. Di Stasio*, 294 Mass. 273, 1 N.E.2d 189 (1936). We find that the indictment sufficiently apprised Jent of the crime charged and that it called him to answer for the death of one particular person and no other.

[19] We also find that the person described in the indictment was the person autopsied. At trial the medical examiner testified that she visited the scene and observed as police took photographs of the victim's body. She identified one of those photographs and stated that she had performed an autopsy on the person in that photograph. One of the eyewitnesses to the entire sequence of events identified one of the photographs taken at the scene as being of "Tammy," the victim. We find that the state introduced convincing, satisfactory, unequivocal proof, compatible with the nature of this case, that sufficiently identified the victim. *See Raulerson v. State*, 358 So.2d 826 (Fla.), *cert. denied*, 439 U.S. 959, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978).

[20] Following his conviction, Jent moved for a new trial, alleging, inter alia, the discovery of new and material evidence.[11] After holding a hearing concerning the newly discovered evidence, the trial court denied the motion. Jent now claims that the trial court erred in denying his motion for new trial.

The motion was predicated on affidavits [12] signed by Elmer Carroll and his girlfriend Tina Marvin, both former residents of Dade City. Carroll's affidavit stated that he witnessed the beating death of a woman named Gail Bradshaw and the subsequent burning of her body. According to the affidavit, this murder took place in the Richloam Game Preserve on July 12, 1979. Marvin's affidavit stated that Carroll related the facts of Bradshaw's death to her.

At the hearing, defense counsel contended that the body identified as "Tammy" was, in fact, that of Gail Bradshaw and that someone other than Jent caused her death. Bradshaw's father, sister, and brother testified at the hearing. Only the brother identified photographs of the body as being his sister.

Elmer Carroll and Tina Marvin also testified at the hearing. On the stand, however, they recanted the statements made in their affidavits. Carroll testified that he was not at the game preserve on July 12 and that he saw nothing violent happen to Bradshaw. When shown a photograph of the body found at the game preserve, he said that it was not Bradshaw. Marvin, when questioned by defense counsel, again stated that Carroll told her that Bradshaw had been killed. On cross-examination, however, she retracted that statement and said that Car-

10. The indictment charged Jent with one count of premeditated murder for the death of "Tammy, a white female, 5' 06" in height, and weighing approximately 120 pounds, a better description of said person to the Grand Jury unknown."

11. New and material evidence which, if introduced at trial, would probably have changed the verdict is a ground for granting a new trial. Fla.R.Crim.P. 3.600(a)(3).

12. We note that a state attorney was not present at the interviews which produced these affidavits and that neither Carroll nor Marvin was represented by counsel during the interviews.

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roll had never told her that Bradshaw had been taken to the game preserve and killed. Further questioning by the state produced the following dialog:

Q Well, then why did you sign an affidavit to that effect swearing that was the truth?

A I was just doing it for Mr. Hersch [Miller's attorney].

Q Why did you do that?

A To help him out I guess.

Q Why did you think you should help him out?

A Because he said he would stand by me all the way.

• • • • • •

[Meaning] he would stand beside me and he also said that he would give me a lawyer.

Both Carroll and Marvin testified that the statements on which their affidavits were based were prompted by Miller's promises, either in person or through his sister, to Carroll and Marvin, respectively, that Miller would see that Marvin and her child were taken care of while Carroll was in jail.

After hearing all the testimony, the trial judge denied the motion for new trial. The judge stated that he did not think a jury would believe Carroll and Marvin's testimony. He stated further that he believed that a jury, if it heard their testimony, would still render the same verdict.

As this Court has previously stated:

In deciding a motion for new trial on the ground of newly discovered evidence, the trial judge must weigh both the evidence adduced at the first trial, and the evidence offered on the motion, in order to determine whether the newly discovered evidence "if introduced at the trial would probably have changed the verdict." Accordingly, the "trial judge has a wide discretion in the matter of granting or denying [motions for new trial] which we will not overthrow unless some abuse is shown." Only very rarely should the trial court's determination be disturbed.

Baker v. State, 336 So.2d 364, 370 (Fla.1976) (citations omitted); *Clark v. State*, 379 So.2d 97 (Fla.1979), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981). After reviewing the record, we find that this case is not one of the rare instances where the trial court's determination should be disturbed. We understand the trial judge's conclusions regarding the incredibility of Carroll and Marvin's statements and testimony and find no abuse of discretion in his ruling.

The indictment charged Jent with one count of premeditated murder. During the trial, one witness testified that the victim had been raped, and the state mentioned that fact several times during closing argument. The court gave the jury the standard instruction on first-degree murder, which includes a felony-murder charge. The court did not, however, instruct on the underlying felony of rape. Defense counsel did not object to this omission, but, rather, concurred in the proposed instructions after examining them.

[21] In his motion for new trial Jent alleged that the court erred in failing to instruct on the underlying felony. The court, however, found Jent's reliance on *State v. Jones*, 377 So.2d 1163 (Fla.1979), and *Robles v. State*, 188 So.2d 789 (Fla. 1966), to be misplaced. The court concluded that those cases did not control the instant situation because the evidence showed an incidental rape during the commission of a premeditated murder rather than an incidental murder during the perpetration of a rape. Relying on *Frazier v. State*, 107 So.2d 16 (Fla.1958), the court found no error regarding the felony-murder instruction.

On appeal Jent again alleges error in that instruction. "Where there is sufficient evidence of premeditation, the failure to give the underlying felony instruction, where it has not been requested, is not error which mandates a reversal absent a showing of prejudice." *Knight v. State*, 394 So.2d 997, 1002 (Fla.1981). In reaching this conclusion we, as did the trial court, relied on *Frazier*. We find that the trial court properly found the failure to instruct on the underlying felony harmless. As the trial court pointed

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out, the state "feebly" argued felony murder; the evidence, however, overwhelmingly shows premeditated murder. The defense did not request such an instruction, and Jent has failed to show that any prejudice resulted from the failure to instruct on the underlying felony.

At the conclusion of the sentencing hearing, the jury recommended that Jent receive the death penalty. The trial court agreed with this recommendation, finding nothing in mitigation, but finding in aggravation that the homicide was especially heinous, atrocious, and cruel and that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.[13] On appeal Jent claims (1) that subsection 921.141(5)(i), Florida Statutes (1979), is an unconstitutional attempt to govern practice and procedure, (2) that the new aggravating factor improperly places a burden of proof on a defendant, and (3) that the trial court improperly restricted the consideration of mitigating evidence. We find no merit to any of these claims.

[22] In *Dobbert v. State*, 375 So.2d 1069 (Fla.1979), *cert. denied*, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980), the appellant attacked section 921.141 in its entirety as an unconstitutional incursion into this Court's power over practice and procedure. We found that claim to have no merit and find no differently regarding the instant claim.

[23, 24] Regarding Jent's second sentencing claim, he alleges that every person convicted of premeditated murder will start the sentencing proceeding with one aggravating circumstance already established. This, Jent argues, will violate due process by forcing the defendant to prove lack of premeditation in the sentencing phase of the trial. We do not agree that this will occur. As we stated in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), the aggravating circumstances set out in section 921.141 must be proved beyond a reasonable doubt. The level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor—"cold, calculated ... and without any pretense of moral or legal justification."

[25] After reviewing the record, we find that the trial court did not improperly limit consideration of mitigating evidence. Jent complains that the court did not instruct the jury on nonstatutory mitigating evidence, but he did not ask the trial court to give the instruction he now propounds to this Court. In fact, when asked by the trial court, defense counsel indicated his satisfaction with the instructions that court proposed to give.

Finding no error, we affirm both the conviction and sentence of death.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.



13. § 921.141(5)(i), Fla.Stat. (1979). The court commented that, on the facts of this case, these two circumstances "seem to blend into one" and appears to have considered them as only a single aggravating factor. In the absence of mitigating factors, finding only a single aggravating factor is sufficient to warrant imposition of the death penalty. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

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Supreme Court of Florida

MONDAY, FEBRUARY 15, 1982

WILLIAM RILEY JENT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 58,744

Circuit Court No. 79-847
(Pasco)

Upon consideration of the Motion for Rehearing filed in the above styled cause by the attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Joseph E. Pittman, Clerk
Hon. Wayne L. Cobb, Judge

David A. Davis, Esquire
Michael J. Kotler, Esquire

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SECTION 921.141, FLORIDA STATUTES (1979)

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

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(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defenant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

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Case No. 81 6549

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RILEY JENT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, WILLIAM RILEY JENT, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: _____
WILLIAM C. McLAIN
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Chief, Capital Appeals
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COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RILEY JENT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, WILLIAM RILEY JENT, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted on December 20, 1980, in the Circuit Court for Pasco County, Florida, for first degree murder, in a jury trial.

2. I received a sentence of death for first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed my conviction and sentence.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state court proceedings.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

William R. Jent
WILLIAM RILEY JENT

Subscribed and sworn to
before me this 14th day
of ~~March~~ APRIL, 1982.

Notary Public

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 1, 1982

81 6549

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for WILLIAM RILEY JENT, the Petitioner, hereby certify that on March 15, 1982, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion For Leave To Proceed In Forma Pauperis with attached Affidavit on each of the parties as follows:

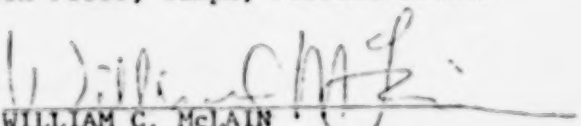
On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Robert Landry, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: _____
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for WILLIAM RILEY JENT, the Petitioner, hereby certify that on March 15, 1982, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Petition For Writ of Certiorari To The Supreme Court of Florida with attached Appendix on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Robert Landry, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Office-Supreme Court, U.S.
FILED
MAY 17 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RILEY JENT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 81-6549

RESPONSE TO PETITION FOR WRIT
OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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ATTORNEY GENERAL

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CASE NO. 81-6549

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM RILEY JENT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

QUESTIONS PRESENTED

I

Whether the Florida Supreme Court has declined to conduct the independent determination of the imposition of death sentence this Court in Proffitt v.Florida, 428 U.S.242 (1976) said that the state court must do, thus rendering Florida's death penalty statute, Section 921.141, Florida Statutes unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution?

II

Whether the trial court denied Jent due process of law when it ruled that witness Samantha Carver continued to have a Fifth Amendment privilege against self-incrimination for a murder charge which the state did not intend to charge her with committing?

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is reported as Jent v. State, 408 So.2d 1024 (Fla. 1981).

JURISDICTION OF THE SUPREME COURT

Respondent agrees that jurisdiction is properly invoked pursuant to 28 USC Section 1257(3) and the Court can exercise jurisdiction to the extent that a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war of public danger; nor shall any person be subject for same offen(c)e to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Section 921.141, Florida Statutes (1980) as set forth in Appendix as A11-13 in the Petition.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Pasco County on August 29, 1979, charged William Jent and his step brother, Ernest Miller, with the premeditated murder of a girl identified as "Tammy" (R.32-33). Subsequent to their plea of not guilty, they filed several pretrial motions.

The court granted a State Motion to Sever (R.139, 1667) and Jent proceeded to trial on December 17, 1979. (Miller was tried and convicted on November 15, 1979). He was convicted as charged (R. 891).

Subsequently, the court sentenced him to death (R. 897). The court found as aggravating circumstances that: (1) the murder was especially heinous, atrocious and cruel (R.892), and (2) it was committed in a cold,calculated and premeditated manner without any pretense of moral or legal justification (R.892). The court found in mitigation only that Jent had no significant history of prior criminal activity (R. 893).

Petitioner also filed a motion for a new trial (R.864-865) and an amended motion for a new trial (R.871-876) alleging that someone else had committed the murder. After considering the evidence presented at this hearing,the court denied the motion (R. 888-889).

The Florida Supreme Court affirmed the lower court's judgment and sentence, Jent v. State, 408 So.2d 1024 (Fla.1981). The court also denied a subsequent motion for rehearing (R.14).

STATEMENT OF THE FACTS

Respondent will rely on the facts as contained in the Florida Supreme Court opinion reported as Jent v. State, 408 So.2d 1024 (Fla.1981). Respondent would also rely on the following facts from the record:

The State presented three eyewitnesses who testified that they saw Petitioner beat and burn the victim:

(1) C. J. Hubbard:

While Miss Hubbard acknowledged that she had been drinking during the evening of the murder, she never admitted to be drunk as Petitioner suggests. A review of her testimony reveals that her recollection of the events that transpired was quite clear. Miss Hubbard was able to relate where she had been (R.1577,1578), who she was with (R.1578) and the events leading up to the murder (R.1581).

When Hubbard arrived at the river tressel, she went for a walk with John (R.1582). Shortly thereafter, Hubbard heard male screaming voices and someone say the word "bitch" (R.1582). Hubbard also heard the fearful screams of a female (R.1582). Hubbard paid no attention to this scream, because she simply figured the party was getting rowdy (R.1583). When Hubbard and Johnny returned to where the others were swimming, Hubbard saw Petitioner and Miller beating a girl in the face and on the back (R.1583-1585). The victim appeared to be unconscious (R.1585). At this point, Miss Hubbard did not attempt to stop Petitioner because she was afraid and felt that the same thing would have happened to her if she had interfered (R.1586). Glenna Frye was standing on the bank of the river at the time (R.1586-1587). Hubbard did not see Patricia Tirikaine (R.1587). After the beating, Miller suggested that everyone leave (R.1587). They got in his car and drove to his house (R.1594). Afterwards, George

Tricia, Glenna, Miller, Petitioner and Samantha drove to the Richloam game preserve in Miller's car (R.1594-1595). Hubbard saw Miller pour gasoline over the girl's body. The next thing she saw was the girl's body going up in flames (R.1595-1596). Petitioner, Samantha and Miller were standing around her (R.1586).

While Miss Hubbard's story changed before trial, she testified that the reason for this was that she was afraid of Petitioner and what he might do to her (R.1486,1610).

2. Patricia Tirikaine.

Patricia Tirikaine testified that she drove to the railroad tressel on July 13, 1979 with Miller and Glenna Frye (R.1612-1613). Petitioner, Ricky and Samantha Carver were already at the river when they arrived (R.1613). Miss Tirikaine testified that later that evening she observed Petitioner punching a girl in the face with his fists (R.1614-1616). She also observed Petitioner hit her with a stick on two occasions (R.1614,1617-1618). Petitioner was using words like "bitch" and "mother fucker" while he was punching and hitting her (R.1617). After Petitioner hit the victim with the stick the second time, he said she was dead (R.1619). While Miss Tirikaine was sick that evening, she was not sick at this time (R.1620). When they drove to Miller's home, Miss Tirikaine began to feel ill and started to throw up (R.1620-1621). Sometime thereafter, they drove to the game preserve and she saw Petitioner and Miller go to the back of the car (R.1621). The next thing she saw was Petitioner and Miller carrying the body of the girl they beat up into the woods (R. 1822,1831). Miller poured some kind of liquid on the body and then Tirikaine saw flames (R.1622). Petitioner was standing right next to the body (R.1622).

While Miss Tirikaine admitted to getting drunk on the evening of the murder, she did not get sick until after they left the railroad tressel. Her recollection of the events was quite clear and in no way conflicts with the testimony of Miss Hubbard. Miss Tirikaine never made mention of the rape at Miller's house, however, this is easily explained. Tirikaine got sick shortly after they left the railroad tressel (R. 1620-1621).

3. Glenna Frye:

Miss Frye testified that on the evening of the murder she went to the tressel with Miller, Petitioner, George, Samantha and Ricky (R.1637). Petitioner, Samantha and Ricky remained at the river while Miller, George and Frye went to the Caboose and Jackies Pub (R.1636). They were joined by Johnny, Patricia and C.J. Hubbard (R.1638). When they went back to the tressel, Samantha got in a fight with a girl by the name of Tammy (R.1641). Petitioner grabbed Tammy and started hitting the girl in the face with his fist (R. 1643). Petitioner was calling her a "bitch" and other assorted names (R.1643). Frye did not attempt to stop them because she was too afraid to move (R.1643). Miller then looked at her and told her to give him a stick (R.1644). Frye did as Miller requested because she was afraid (R.1644). Frye saw Miller strike Tammy with the stick (R.1644). While she did not see Jent strike her with the same stick, she could not watch the whole time because she was afraid (R.1644). Miller and Petitioner carried Tammy to the car (R.1645). They all then drove to Miller's house (R.1649). Miller got out of the car and went to the trunk while the rest of the group went into the house (R.1666). Sometime thereafter, Miller came into the house and told everyone they were leaving (R.1660).

Miller then opened the trunk of the car and he and Petitioner got Tammy out (R.1666). They laid her on the trunk lid and Miller proceeded to undress her (R.1660). Miller and George had sex with her first (R.1667). While C.J. was standing beside her, Frye did not know how much C.J. could see (R.1668). At the time, Patricia was also present, however, she was throwing up (R.1668). Frye did not try to stop them because she was afraid (R.1669). Petitioner performed oral sex on Tammy and then had sexual intercourse with her (R.1669). Frye testified that the girl Petitioner raped was the same girl that was beaten at the railroad tressel (R.1670). After Johnny had sex with Tammy, they put her body back in the trunk and everyone drove to the game preserve (R.1671). On the way to the game preserve, Frye learned that the fight between Samantha and Tammy was over Petitioner (R.1672). When they reached the game preserve, Miller told everyone to get out of the car (R.1673). Miller then opened the trunk and he and Petitioner carried Tammy's body over to the driver's side of the car (R.1673). When they laid her down, Miller poured gas on her (R.1673). As Tammy attempted to get up, Petitioner hit her again (R.1673). The next thing Frye observed was Petitioner and Samantha with fire in their hands (R.1674). When Frye heard Patricia scream, she turned around and saw that Tammy was burning (R.1674). Patricia was screaming because she thought something was going to happen to her (R.I675).

While Frye admitted to having used a substance called Crystal Tea on the day of the killing, she testified that this substance merely gave her more energy (R.1683-1685). Frye also admitted using marijuana during the day, but she then added that it was not very good and they did not get high

while they were smoking (R.1689). As for Frye giving two different versions of what transpired that evening, she also indicated that she originally had been afraid to tell what happened (R.1693).

4. James Boone:

James Boone shared a cell with Petitioner. Boone testified that Petitioner told him that he had sexual intercourse with Tammy (R.1719,1721). Boone also testified to the details of the beating and the burning (R.1668-1670).

ARGUMENT

ISSUE I

THE FLORIDA SUPREME COURT HAS DECLINED TO CONDUCT THE INDEPENDENT DETERMINATION OF THE IMPOSITION OF DEATH SENTENCE THIS COURT IN PROFFITT V. FLORIDA,428 U.S.242 (1976) SAID THE COURT MUST DO. THUS RENDERING FLORIDA'S DEATH PENALTY STATUTE, SECTION 921.141, FLORIDA STATUTES, UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONTITUTION. 1/

In Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), the Florida Supreme Court stated what its review function would be in death cases:

> ". . .The Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. . ."
>
> "The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great.

1/ Petitioner states at page 12 of his petition that the heinousness of the murder was the only aggravating factor the trial court found to exist. This is incorrect. The trial court also found that the murder was committed in a cold, calculated and premeditated manner without any moral or legal justification

Proffitt v. Florida, 428 U.S.242, 96 S. Ct. 2960, 49 L.Ed2d 913 (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 446 U.S. 943,94 S.Ct. 1950,40 L.Ed2d 295 (1974). . ."

> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disporportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.
>
> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Mikenas v. State, 367 So.2d 606,610 (Fla. 1978); Accord, *Hargrave v. State*,366 So.2d 1 (Fla. 1978), *cert. denied*, 444 U.S.919,100 S.Ct.239,62 L.Ed2d 176 (1979).

See also Smith v. State, 407 So.2d 894 (Fla.1981).

The Florida Supreme Court's decision in Brown, supra, was before this Court by way of a Petition for Writ of Certiorari which was denied on November 2, 1981, Brown Wainwright, ___U.S.___, 70 L.Ed 2d 407, 102 S.Ct. 542 (1981). If Florida's application of the death penalty statute no longer met the dictates of Proffitt v. Florida, supra, this Court could have accepted certiorari at that time.

Petitioner attempts to rely on the Florida Supreme Court's decision in Tibbs v. State, 337 So.2d 788 (Fla.1976).

which held that the reviewing court could reweigh the evidence used to convict a defendant. Petitioner's reliance is misplaced. Respondent would point out that the Florida Supreme Court receded from this opinion, holding that its proper function is to review not reweigh the evidence. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981). This was clearly the perogative of the state court to determine how the law should be applied, Wainwright v. Stone, 414 U.S.21,38 L.Ed 2d 179, 94 S.Ct. 190 (1973). Respondent would also point out that the Tibbs I applied to the guilt phase of the trial. Petitioner's attempt to apply this case to the sentencing phase of the trial is clearly in error.

ISSUE II

WHETHER THE TRIAL COURT DENIED JENT DUE PROCESS OF LAW WHEN IT RULED THAT WITNESS SAMANTHA CARVER CONTINUED TO HAVE A FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION FOR A MURDER CHARGE WHICH THE STATE DID NOT INTEND TO CHARGE HER WITH COMMITTING. 2/

Petitioner contends that the State sought to suppress Samantha Carver's testimony by raising the possibility that it may at some time in the future charge her with murder. Petitioner's contention is totally without merit.

While a criminal defendant ". . .has a right to everyone's evidence" unless some privilege conditions that duty, United States v. Mandujano, 425 U.S.564, 48 L.Ed.2d 212, 96 S.Ct.1768 (1976), it is important to note at the outset that it was not the State who objected to Petitioner's attorney deposing Miss Carver. Carver, upon the advice of her own counsel, asserted her right to remain silent and

2/ The issue as framed in the Florida Supreme Court was whether or not the trial court erred in denying Petitioner's motion for continuance so that he could depose Samantha Carver. Petitioner is not directing this Court in a different direction. In Cardinale v. Louisiana, 394 U.S.437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969), this Court stated that it would not decide federal constitutional issues raised for the first time on review of State court decisions.

refused to be questioned (R.1976-1977).[3/]

Carver had pled nolo contendere to accessory after the fact, for aiding Petitioner in his escape and preventing his lawful conviction (R.1987). She had not yet been adjudicated and sentenced on this charge (R.1980). Petitioner suggests that the State granted Carver immunity from prosecution for any higher crime based upon the facts surrounding this incident. This is simply not the case. The State Attorney told the court that if sufficient evidence were to become available, the State intended to go to the Grand Jury and seek an indictment against her for murder (R.1984).

> "MR. COPE: Judge, as a matter of the record, may I clarify the representation by Mr. Cole or Mr. Council was that the facts as they are now known and that should subsequent evidence become available, the State has the absolute ability to go forward and to go to a grand jury to ask for an indictment for murder one should subsequent evidence become available, but as the facts are and as they are now known, we did agree to that because there was not and is not sufficient evidence to charge her with anything else at this point.
>
> (R.1983-1984)

Since accessory after the fact is not a lesser included offense of murder, c.f. Newkirk v. State, 222 So.2d 435 (Fla. 3d DCA 1969), the State would be in a position to institute further proceedings against Miss Carver for murder.

Petitioner cites Brady v. Maryland, 373 U.S.83,10 L.Ed.2d 215, 83 S.Ct.1194 (1963) for the proposition that it is a violation of due process for the State to suppress material evidence requested by the defendant.[4/] Brady, supra is totally

3/Petitioner concedes at page 14 of his petition that Miss Carver had a legitimate Fifth Amendment privilege to exercise.

4/The State initially furnished Miss Carver's name to Petitioner in discovery simply because other witnesses indicated that she was present at the time of the crime (R.1981). The state had no intention of calling Miss Carver as a State witness (R.1981,1991) and she was not called by the State to testify. The State was not aware that Miss Carver possessed inculpatory or exculpatory information as to Petitioner (R.1991). The only statements Carver made were to the police and in those statements she indicated that she did not know or remember anything (R.1981,1991-1992).

inapplicable to our factual situation. The State did not coerce Miss Carver to invoke her Fifth Amendment privilege. There was no promise by the State to grant Miss Carver immunity. As previously noted, the State allowed her to plead nolo contendere to the accessory charge because they did not have sufficient evidence to prosecute her for murder. If facts ever arose, the State indicated they would seek an indictment against her whether or not she testified at Appellant's trial. The State in no way attempted to suppress Miss Carver's testimony.

CONCLUSION

For the reasons stated, Respondent respectfully requests this Court to deny writ of certiorari.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MICHAEL J. KOTLER
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to David A. Davis, Assistant Public Defender, 495 N. Carpenter Street, Bartow, Florida 33830 on this the 14th day of May, 1982.

Of Counsel for Respondent